No. 82-1061

In the
Supreme Court of the United States
OCTOBER TERM, 1982

ROBERT BEGASSAT,

Petitioner,

vs.

THE COSMOPOLITAN NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST NO. 13199 AND JOHN MAGNA,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

BRIEF OF RESPONDENTS IN OPPOSITION

MARTIN R. ROTHENBERG
180 North LaSalle Street
Suite 2101
Chicago, Illinois 60601
(312) 236-2305
Counsel of Record for Respondents

JANUARY 28, 1983

The Scheffer Press, Inc.—(312) 263-6850

ADDITIONAL QUESTION PRESENTED

Whether a Petition for Writ of Certiorari to the Illinois Supreme Court should be denied when the highest Illinois court deciding the case was the Illinois Appellate Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

CONSTITUTIONAL PROVISION, STATUTE AND COURT RULES INVOLVED

1970 ILL. CONST. art. 1, §2

> No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

28 U.S.C. §1257(3)

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> > (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Fed. R. App. P. 36

> ENTRY OF JUDGMENT. The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

Ill. Sup. Ct. R. 23, as it existed prior to April 1, 1982

When the appellate court determines that an opinion would have no precedential value, that no substantial question is presented, or that jurisdiction is lacking, it may dispose of the case by an order briefly stating the reasons for its decision.

Ill. Sup. Ct. R. 341(e)(7)

(e) Appellant's Brief. The appellant's brief shall contain the following parts in the order named:

(7) Argument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on. As to cases involving constitutional questions appealed directly from the circuit court to the Supreme Court, see Rule 302(b). Evidence shall not be copied at length, but reference shall be made to the pages of the record on appeal, excerpts or abstract where evidence may be found. Citation of numerous authorities in support of the same point is not favored. Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1982

No. 82-1061

ROBERT BEGASSAT,

Petitioner,

vs.

THE COSMOPOLITAN NATIONAL BANK OF CHICAGO AS TRUSTEE UNDER TRUST NO. 13199 AND JOHN MAGNA,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Because the petition of petitioner Robert Begassat ("Begassat") is incomplete and inaccurate,[1] respondent John Magna ("Magna")[2] is compelled to submit this statement of the case.

This case involves two claims. First, Begassat seeks specific performance of a written March 27, 1975, contract (the "contract") with Magna to purchase premises commonly known as 1404 North LaSalle Street, Chicago, Illinois (the "premises"). The contract allegedly arose from Begassat's proper exercise of an option to purchase contained in his written October, 1974, lease from

---

[1] One error may confuse the Court: Begassat's "attempted . . . purchase" occurred on or about March 27, 1975, not March 26, 1976, as stated in Pet. 6, paragraph 1. Statements unsupported by the record include the following: Pet. 2, paragraph 2; Pet. 4, paragraph 1, first sentence; and Pet. 8, second complete sentence. The statement in the first complete sentence on Pet. 8 does not appear in the record, although in answer to a hypothetical question, Begassat contended $45,352.97 ($10,155.60 principal and the balance interest), R. 132, 138-39, would have been payable under terms of the mortgage he allegedly would have signed if the contractually-scheduled 1975 closing had occurred. R. 136. Begassat's claim, in Pet. 17, that he "stands to lose any interest and all his accumulated equity" in the premises is misleading. The record contains no indication that he has any interest, or equity in the premises, particularly in light of the trial court's decree. Pet. Ex. 3.

[2] "John Magna" is used to refer to both respondents. Respondent The Cosmopolitan National Bank of Chicago as trustee under trust No. 13199 is an Illinois land trust holding legal title to the subject premises of the litigation, 1404 North LaSalle Street, Chicago, Illinois. Respondent John Magna is the trust's beneficiary with active control of the premises.

Magna of the premises. Second, Magna claims that Begassat is not entitled to this equitable remedy, in part because Begassat was not ready, willing and able to perform under any contract and, therefore, should be evicted from the premises because the lease has expired.

At trial, each party charged the other wrongfully failed to close the contemplated sales transaction.

Begassat claimed Magna prevented the closing by not curing a building code violation preventing good title from being conveyed.

Begassat testified he talked to his mother on the telephone at least ten times from early 1974 through 1975 about arranging financing, or arranging a loan, to raise funds to purchase the premises, although his mother and he never settled on a specific figure. R. 146-47. He also mentioned without elaboration that he spoke with unspecified "other persons" about financing. R. 146.

The contract provided that if Magna did not cure problems such as the building code violation within a specified time during 1975, Begassat could either terminate the contract, or give Magna notice, within ten days after the expiration of the time to cure, that he elected to take title as it was and to deduct money from the purchase price. If Begassat did not so elect, the contract was to become null and void without further action of the parties. R. C8, R. 204. Begassat neither terminated the contract nor elected to take title as is. Further, he never asserted any right under any pre-March 27, 1975, legal relationship, despite the inference contained in Pet. 5.

Magna claimed Begassat prevented him from curing the building code violation. R. 286, 308, 363-65. Between 1976 and 1979, Magna and his attorney repeatedly attempted, without success, to discuss pending matters with Begassat. R. 223, 251-52, 285-86, 364, 374-75. During that time, Begassat's only responses to such attempts were three mailgrams declining meeting times Magna suggested, but offering no alternatives.

The trial court found Begassat failed to prove entitlement to specific performance. The appellate court affirmed that ruling.

REASONS FOR DENYING THE WRIT

Petitioner seeks certiorari to the wrong court and raises issues which are not substantial federal questions and were not properly preserved in the courts below.

I.

THE PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT SHOULD BE DENIED BECAUSE THE HIGHEST ILLINOIS COURT DECIDING THE CASE WAS THE ILLINOIS APPELLATE COURT.

If this Court has jurisdiction of this case under 28 U.S.C. §1257(3), to review final judgments of "the highest court of a State in which a decision could be had," then the judgment to be reviewed is that of the Illinois Appellate Court, Pet. Ex. 2, since the Illinois Supreme Court on October 5, 1982, denied Begassat's petition for leave to appeal. Pet. Ex. 1. *Pennsylvania Rd. Co.* v. *Illinois Brick Co.*, 297 U.S. 447, 453 (1936). Nevertheless, the petition is directed to the State Supreme Court and time to seek this Court's review of the appellate court decision has expired. Since the writ is sought to the wrong state court, the petition should be denied. *Costarelli* v. *Massachusetts*, 421 U.S. 193, 19[illegible] n.3 (1975) (per curiam); *Randall* v. *Board of Commissioners*, 261 U.S. 252 (1923) (mem.); *Western Union Telegraph Co.* v. *Hughes*, 203 U.S. 505, 507 (1906); *Lan[illegible]* v. *Wallace*, 131 U.S. app. 219 (1881).

II.

PETITIONER RAISES NO SUBSTANTIAL FEDERAL QUESTION AND FAILED TO RAISE AND PRESERVE ANY FEDERAL ISSUE IN THE STATE COURTS.

No substantial federal question is presented or claimed to exist in this case, which was decided solely on state issues in the lower courts, as Pet. Ex. 2 and 3 indicate.

No federal issue was raised and preserved in the state courts and, thus, the petition does not attempt to comply with United States Sup. Ct. R. 21.1(h) and cannot comply. Therefore, Begassat has not sustained his burden of proving this Court's jurisdiction, *Gorman* v. *Washington Univ.*, 316 U.S. 98, 101, *rehearing denied*, 316 U.S. 711 (1942); *DeSaussure* v. *Gaillard*, 127 U.S. 216, 234 (1888), and the Court is without jurisdiction. *Webb* v. *Webb*, 451 U.S. 493 (1981), *dismissing petition for cert.*; *Bowe* v. *Scott*, 233 U.S. 658, 664-65 (1914).

In this Court, Begassat's first point is an objection to the appellate court's Illinois Sup. Ct. R. 23 order, Pet. Ex. 2, which reviewed the evidence in the record and disposed of the appeal, by deciding he was not entitled to specific performance under Illinois decisional law, a determination which mooted all other issues.[3] Begassat

---

[3] Apparently, petitioner's complaint is that the appellate court order did not discuss each issue he raised, but instead dealt only with a dispositive issue. However, he cites no legal authority giving him a federally-protected right to have all such issues formally discussed in a court opinion. He does not suggest the nexus between the order that issued and any alleged constitutional injury and he does not specify the alleged injury the order caused him. The only authority he cites in connection with his argument, *Hughes* v. *Rowe*,

does not dispute that the state court decision is supported by adequate and independent non-federal grounds, so this Court ought not assume jurisdiction to review and reweigh the evidence, or inferences drawn from it. *McQuade* v. *Trenton*, 172 U.S. 636, 639-40 (1899).

Begassat did not raise in Illinois the Rule 23 issue he attempts to raise before this Court. In his petition seeking Illinois Supreme Court appeal, he argues the impropriety of the appellate court's April 12, 1982, order by citing and discussing Rule 23 only as it existed prior to April 1, 1982.[4] However, the rule under which the appellate court order issued became effective April 1, 1982, eleven days before the opinion was issued. Thus, Begassat never presented the Illinois Supreme Court with the opportunity to rule on the propriety of the new, current rule.

Under Ill. Sup. Ct. R. 341 (e)(7), "[p]oints not argued are waived . . . ," a waiver binding on this Court. *Beck* v. *Washington*, 369 U.S. 541, 553 (1961); *Herndon* v.

---

[3] (Continued)

449 U.S. 5 (1980), contains, at most, slight criticism of the federal appellate court's handling of an issue by unpublished order, but does not question the constitutionality of unpublished orders, a procedure encouraged by Fed. R. App. P. 36 and approved in *Taylor* v. *McKeithen*, 407 U.S. 191, 194, n.4 (1972) (per curiam).

[4] Quoted at Pet. 6-7 is the new rule. The old rule provided:

> When the appellate court determines that an opinion would have no precedential value, that no substantial question is presented, or that jurisdiction is lacking, it may dispose of the case by an order briefly stating the reasons for its decision.

Georgia, 295 U.S. 441, 442-43 (1935). Begassat, therefore, waived his privilege to complain in this Court about new Ill. Sup. Ct. R. 23, the only version of the rule that could have affected him.

Begassat similarly waived his second argument to this Court. The second issue Begassat raises in this Court (the "*sua sponte* affirmative defense" issue) never was raised in the state courts as a federal issue, despite the jurisdictional requirement contained in 28 U.S.C. §1257 (3).

The language of his phrasing of this question to the Illinois Appellate Court, Pet. 11-12, does not refer to the Constitution, or any statute of the United States. The "Statutes Involved" section of his appellate court brief does not refer to any federal statute and the only constitutional provision quoted is 1970 ILL. CONST. art. 1, §2, providing that "[n]o person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." Pet. App. Ct. Brief 4-5. The twenty sources he cites in this section of his appellate court brief include six Illinois Supreme Court and thirteen Illinois Appellate Court decisions, plus a reference to 17 Am. Jur. 2d *Contracts* §506. In his appellate court argument on this issue, Pet. App. Ct. Brief 15-22, he mentions nothing federal and his reference to due process, Pet. App. Ct. Brief 15-16, concerns only Illinois law, noting at page 16 that "Illinois's [sic] courts have long regarded procedural due process as an important element in our legal system."[5]

[5] Petitioner raises no federal issue in his discussion of this issue in Pet. App. Ct. Reply Brief 4-5, where he reiterates his general statements of Illinois law.

Begassat's petition seeking Illinois Supreme Court appeal contains no reference to the *sua sponte* affirmative defense issue. Even if it did, the *sua sponte* affirmative defense issue would not present a basis for appellate court reversal.[6] The trial court's oral pronouncement, cited at Pet. 15, was not the court's final order, Pet. Ex. 3, and, therefore, is not appealable in Illinois. *Pyle* v. *Springfield Marine Bk.*, 330 Ill. App. 1, 7 (1946); 5A Nichols, *Illinois Civil Practice* §5663 (1975). See, generally, 4 C.J.S. *Appeal & Error* §153c (1957).[7] Even if the trial court's oral statement were in error, an Illinois Appellate Court nevertheless could affirm a judgment on any basis appearing in the record, *Rabus* v. *Calcari*, 16 Ill. 2d 99, 101-02 (1959),[8] as petitioner admits occurred in this case. This Court may not disregard either this Illinois rule, *John* v. *Paullin*, 231 U.S. 583, 585 (1913), or the explicit holding of the state court. *Guaranty Trust Co.* v. *Blodgett*, 287 U.S. 509, 512 (1933).

---

[6] Further, petitioner presents no reason to assume the court's reference to impossibility was intended to be a legal, rather than a factual, conclusion.

[7] No quarrel exists, of course, with petitioner's broad statements of general principles of law at Pet. 17-18 (although some of the supportive citations should be corrected as follows: *Lambert*: 1957; *Gault*: at page 33; *Grannis* is the correct spelling, as is *Willner*, whose correct page citation is at 105). However, as with the many cases he cites in his appellate court brief, the correct statements of law are inapposite.

[8] This rule accords with the federal rule. *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

MARTIN R. ROTHENBERG
180 North LaSalle Street
Suite 2101
Chicago, Illinois 60601
(312) 236-2305
Counsel of Record for Respondents

JANUARY 28, 1983